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Chambers of Judge Davison

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY
DOC #:
DATE FILED: 9/30/22

Miguel Martinez,

Petitioner,

- against -

Superintendent of Sing Sing Correctional
Facility,

Respondent.¹

19 Civ. 7651 (KMK)(PED)

ORDER

PAUL E. DAVISON, U.S.M.J.:

On September 9, 2020, this Court entered an Order granting a stay of the instant petition pending the resolution of a § 440.10 motion that Petitioner Miguel Martinez filed in the trial court. The Order specified that upon the resolution of Petitioner's § 440.10 motion, "Petitioner must move, within thirty (30) days, to lift the stay and reopen this case for further proceedings." [Dkt. 16.] The Order further warned Petitioner that if he did not comply and inform this Court regarding the resolution of his § 440.10 motion, this Court would recommend that the entire petition be dismissed without prejudice. *See Zarvela v. Artuz*, 254 F.3d 374, 381-82 (2d Cir. 2001). The Order also advised Petitioner that he must prepare and file an amended Petition setting forth all claims, including those within his § 440.10 motion. [Dkt. 16.] On June 29, 2022, this Court requested that the parties advise the Court regarding the status of Petitioner's § 440.10 motion and whether the stay should be lifted. [Dkt. 18.]

Respondent has advised this Court that Petitioner's state court motion has been resolved. By

¹ Petitioner was incarcerated at Five Points Correctional Facility in Romulus, New York, at the time he filed the instant Petition. Petitioner is now incarcerated at Sing Sing Correctional Facility in Ossining, New York. Accordingly, the Superintendent of Sing Sing Correctional Facility is substituted as respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. The Clerk of the Court shall amend the caption to reflect the substitution.

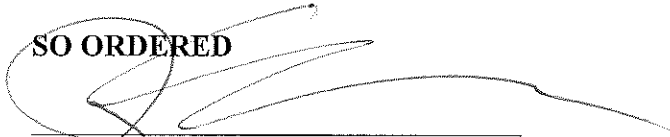
Decision and Order dated September 24, 2021, the Supreme Court for the County of Westchester denied Petitioner's § 440.10 motion. [Dkt. 21-3 at 4.] Petitioner did not request leave to appeal the denial of his § 440.10 motion to the Appellate Division, Second Department within the 30 days allowed for such a request. *See* N.Y. C.P.L. § 460.10 (4)(a). Accordingly, Petitioner's § 440.10 motion is no longer pending before the state courts.

Petitioner has thus failed to comply with conditions set forth in the September 9, 2020 Order because more than 30 days have elapsed since the expiration of Petitioner's deadline to request leave to appeal to the Appellate Division. The Court notes that, upon Petitioner's failure to comply with the conditions of the stay, the Court may vacate the stay *nunc pro tunc* as of the date it was entered and recommend that the petition be dismissed. *See Zarvela*, 254 F.3d at 381-82.

Accordingly, Petitioner is hereby **ORDERED TO SHOW CAUSE** why dismissal is not warranted. Petitioner must respond to this Order within 30 days. Specifically, Petitioner must inform this Court whether he seeks to lift the stay and to have his petition for federal *habeas* relief considered.

Dated: September 30, 2022
White Plains, New York

SO ORDERED



Paul E. Davison
United States Magistrate Judge

A copy of this Order has been mailed to:

Miguel Martinez
DIN #16A1392
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562